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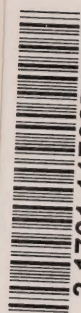
National Energy Board



CANADA

The Public Hearing Process

The National Energy Board considers major applications through public hearings. The Board's hearing process is described, including the initial examination of an application, where hearings are held, where applications may be examined, the roles of Board Counsel, staff and the Court Clerk, the sequence of procedures at the hearing, and the issue of the decision.



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THE BOARD

The National Energy Board is an independent federal agency that was created by the Parliament of Canada in 1959. The Board's prime function is to regulate certain areas of the oil, natural gas, and electrical utility industries. Its powers and jurisdiction are based on the National Energy Board Act. Copies of the Act are available from the Canadian Government Publishing Centre, Supply and Services Canada, Ottawa, K1A 0S9 (Price: Canada \$2.75; other countries \$3.30, prices subject to change).

PUBLICATIONS

This information bulletin is one of a series that the Board is publishing on its activities and procedures. Comments on this bulletin or suggestions for future topics would be most welcome.

These bulletins provide general information only. For exact details on particular items, see the relevant legislation.

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THE PUBLIC HEARING PROCESS

Foreword

The practices described in this information bulletin are those currently followed by the National Energy Board. The Board has new Rules of Procedure in preliminary draft form which, when adopted, will change slightly some of these practices. This bulletin will then be revised and reissued.

Types of Hearing

The National Energy Board considers major applications through public hearings. Such applications include requests for licences to export oil for more than a year or natural gas or electricity, applications for certificates to authorize the construction of oil or gas pipelines or international power lines, and applications for the setting of pipeline tolls.

The Board also conducts inquiries by means of public hearings. For example, the Board is well known for its forecasts of energy supply and demand, especially for natural gas. These forecasts are issued every few years, following hearings at which all major segments of the industry and other interested parties present their views and estimates.

The First Step

The consideration of an application is initiated when a company files the application with the Secretary of the Board. Once an application has been filed, it becomes a public document. It is placed in the Board's library in Ottawa, where the public may examine it. The filing is announced by a news release and is listed in the next issue of the Board's quarterly Regulatory Agenda.

Public inquiries are undertaken by the Board, either on its own initiative or at the request of the Minister of Energy, Mines and Resources. The inquiry is announced by a press release and listed in the Regulatory Agenda.

Communications

Once an application has been filed, all communications about it between the Board and the Applicant or any other party are conducted formally through the Secretary or the Board's legal

counsel. Thus any information received by the Board is made available to all parties.

The Initial Examination

When an application has been filed, copies of it are distributed to Board Members and selected professional and technical staff. They examine the application to ensure that it includes the information required under the rules or regulations, or needed before the hearing for the conduct of an adequate cross-examination and for a full understanding of the case. The Board may then send one or more letters to the Applicant, asking for any necessary additional material. All such letters and their replies are public documents and become part of the application.

The Hearing Order

As soon as the Board is satisfied that the application is, or will shortly be, ready for hearing, it issues a hearing order. This order states that a public hearing will be held at a certain location, starting on a certain date, or sometimes on a date to be announced later. In addition the order sets out various procedures to be followed. It lists the newspapers in which the Board requires the Applicant to publish the Notice of Hearing. It specifies various dates, such as the deadline by which anyone wishing to take part in the hearing should submit an intervention to the Board. The hearing order usually provides for intervenors to submit written requests for information to the Applicant and to each other, both before and during the hearing, thus saving time at the hearing itself.

A news release announcing the hearing is issued at the same time as the hearing order.

The Location of the Hearing

The National Energy Board has its own hearing room in its offices at 473 Albert Street, Ottawa. Public hearings may be held, however, anywhere in Canada. It is the Board's policy to conduct them, at least in part, wherever the public could be most affected by the granting of the application. Sometimes a hearing is

moved from one location to another to accommodate local interest.

All hearings are open to the public, including the press. Photographs and video recording without sound may be allowed with the permission of the Presiding Member, but usually only for a short time after the day's commencement or any break.

Availability of the Application

The hearing order states where the public may examine the application, including all associated documents. The locations include the National Energy Board Library in Ottawa and the head office of the applicant company. For hearings which are expected to be of substantial local interest, the Board arranges for additional locations such as libraries or town halls near the hearing sites.

Usually the hearing order provides that anyone who submits an intervention is entitled to receive a copy of the application from the Applicant.

Interventions

An intervention is a document sent to the Board to express an intention to participate in a public hearing. It may take the form of a formal legal submission, a letter, or even a telex. It should be received by the Secretary of the Board before the deadline stated in the hearing order.

Probably the most important requirement of an intervention is to demonstrate that the intervenor has a real interest in the application. A real interest means that the intervenor would be affected by the granting or denial of the application. If such an interest cannot be shown, the Board may refuse to accept the submitter as an interested party.

For further information on interventions, see Information Bulletin No. 4, "How to Intervene" (to follow).

Language

The Board operates in both official languages. Applications and submissions of any kind may be written in either En-

glish or French, and the Board responds in the same language.

At every public hearing, simultaneous interpretation is provided whenever a party to the hearing requests such service in his intervention, or if it appears likely that both languages will be used.

The Bench

Most hearings are held before a panel of three Board Members, three constituting a quorum of the Board. The decision on the application is made by the three Members.

Sometimes an application is heard by a single Member to whom the Board has delegated its powers for this purpose (Section 13 of the Act). The single Member then renders the decision. This procedure is available only for applications under certain sections of the Act.

Alternatively a single Member may be authorized to take the evidence and submit a report to the Board (Section 14 of the Act). The Board then makes the decision: it may adopt the Presiding Member's report as its own decision or it may arrive at a different one.

Board Counsel

The Board Counsel has two main functions. The first is to advise the Board on legal matters and the conduct of the hearing. The second is to cross-examine the Applicant's and intervenors' witnesses in order to bring out clearly the evidence needed for the Board to arrive at a decision.

Board Counsel does not play an adversarial role and does not oppose or support either the Applicant or any intervenor. He or she is available to assist all parties, especially those not represented by counsel.

Board Staff

Staff has no separate mandate of its own, but works under the direction of the Board. The staff at a hearing may consist of engineers, geologists, environmentalists, economists and accountants, depending on the nature of the case. The role of Board Staff is to advise the Board on technical matters

and to brief Board Counsel so that he is fully prepared to conduct an effective cross-examination.

The Court Clerk

The Court Clerk or hearing process officer is in charge of all the physical arrangements for the hearing. He also arranges for simultaneous interpretation if it is required, receives and records all exhibits, produces an exhibit list, and generally contributes to the smooth functioning of the hearing.

The Court Reporters

The Board has a contract with a firm of court reporters to provide verbatim transcripts of the hearings. The transcript of each day's proceedings is normally available within five hours after the hearing closes. It records the evidence in whichever official language was spoken, not the simultaneous interpretation.

Transcripts are available for purchase from the court reporters. Photocopying of transcripts is prohibited.

Sequence of Procedures

The Board's public hearing process is relatively formal and is similar to that of a court. Testimony is provided by witnesses under oath who are subject to cross-examination. Most parties are represented by lawyers, and while the Board encourages such representation, it is by no means essential.

A pre-hearing conference is sometimes held to resolve procedural questions before the start of the hearing.

Most public hearings follow a relatively standard procedure. First the Presiding Member makes a brief opening statement. Next the Applicant files proof of having complied with the Board's requirements for publication of the hearing notice and service of copies of the application on various parties.

Then the Applicant presents its case through a series of witnesses or of panels of witnesses. To expedite the hearing, the Board encourages the use of pre-filed evidence. After the Applicant's counsel has completed his examination-in-chief of each of his wit-

nesses or panels, each intervenor in turn (or his counsel if he has one) is given the opportunity to cross-examine that witness. The sequence in which the intervenors cross-examine is usually announced in the Presiding Member's opening statement. The Board Counsel usually cross-examines last. Board Members may then ask questions. Finally the Applicant is given an opportunity to re-examine his witnesses.

Once the presentation of the Applicant's case has been completed, each intervenor in turn is given the opportunity to present witnesses. The sequence of intervenors is determined by the "Order of Appearances", a document available from the Court Clerk. Each witness, after being examined by his own counsel, is cross-examined in turn by counsel for the Applicant, by any intervenors who wish to cross-examine, and by Board Counsel. Again, following any questions by Board Members, the intervenor may re-examine his witnesses.

Finally the Applicant may be given the opportunity to call evidence to rebut the evidence of intervenors.

After all parties to the proceedings have presented their evidence, the hearing enters its final stage, the "argument". This stage may follow either immediately after the presentation of evidence or after a short delay to permit preparation of argument.

The Applicant's counsel speaks first, presenting arguments on why the application should be granted. Then each intervenor speaks either for or against the application. Finally the Applicant is given an opportunity to reply. Board Counsel may speak, but usually does not present argument.

Once all argument is finished, the Presiding Member closes the hearing.

"Written argument" is a variant of the argument stage of the hearing in which all arguments are presented to the Board in writing instead of orally. The process may take a number of weeks, the sequence and timing usually being set by the Presiding Member before the hearing closes.

Intervenors' Costs

From time to time the Board is asked by intervenors to award costs. The Board, however, has no authority to award costs, except under Section 29.6 of the NEB Act to landowners for their costs of participating in a local hearing on the detailed routing of a pipeline or a power line. Such landowners should consult Board Counsel at the hearing.

The Decision

Occasionally the Board hands down a decision from the bench at the close of the hearing. In most cases, however, the Board reserves its decision until later.

After time for consideration, the Board releases its decision in the form of written Reasons for Decision, explaining the outcome of the application. A news release is also issued at the same time.

The Reasons for Decision and the news release are published in both official languages.

Governor in Council Approvals

Any decision by the Board to issue a licence to authorize exports (except exports of oil for up to a year) or a certificate to authorize the construction of a pipeline or international power line requires the approval of the Governor in Council, exercised through a committee of the Privy Council for Canada, i.e., the Cabinet. The Board's decision must be either approved or refused; it may not be altered.

A denial of an application by the Board is final and is not subject to Governor in Council approval. Toll decisions do not require Governor in Council approval.

Section 17 Reviews

Under Section 17 of the National Energy Board Act, the Board may review and alter any decision it has made.

A party to a public hearing may apply for a review of the decision. Such

reviews are the exception rather than the rule, and are available only if specific conditions set out in the Rules of Practice and Procedure are met. If the Board decides that a review is warranted, it may conduct it by holding another hearing or by calling for written submissions.

Any change to a licence or certificate resulting from a review is subject to approval by the Governor in Council.

Appeals

A decision or order of the Board may be appealed to the Federal Court of Appeal on a point of law or jurisdiction. Leave to appeal must be obtained by applying to the Court within a month of the release of the Board's decision, unless the Court allows further time.

Judgements of the Federal Court may with leave be appealed to the Supreme Court of Canada.

